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IN THE MATTER OF:	
Robert T. Sandman, III Claimant	
Against	Case No.: 1999-LHC-1666
	OWCP No.: 1-121067
General Dynamics Corporation Employer/Self-Insurer	

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on September 2, 1999 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 15	Attorney Roberts' letter setting forth the relief Claimant seeks in this proceeding	09/16/99
CX 16	Attorney Roberts' letter advising that the deposition of William Witt went forward as scheduled	09/24/99
RX 20A	Attorney Proctor's letter filing the	10/06/99
RX 20	September 14, 1999 Deposition Testimony of William Witt	10/06/99

The record was closed on October 6, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On August 15, 1991, Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on April 7, 1999.

7. The applicable average weekly wage is $509.12, thereby producing a compensation rate of $339.41.

8. The Employer voluntarily and without an award has paid temporary total compensation from August 16, 1991 through September 15, 1991 from September 18, 1991 through March 15, 1992 and from

March 25, 1998 through April 20, 1999 for a total of $29,286.23. Medical benefits thus far total $20,669.77.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. Permanency is not an issue herein.

3. Employer's credit for the net amount of compensation benefits paid Claimant under the state act.

Procedural Issue

At the hearing on September 2, 1999 both counsel initially objected to certain exhibits being offered by opposing counsel on the grounds that the challenged exhibits were exchanged by and between counsel in violation of the so-called forty-five (45) day rule established in the Notice of Hearing and Pre-Hearing Order issued by this Court on May 6, 1999. (ALJ EX 1) This evidentiary issue is fully discussed at the official hearing transcript at pages 10 through 47 and the Court's rulings were made on the basis of the Board's decision in **Williams v. Marine Terminal Corp.**,14 BRBS 728 (1981), an excellent decision giving this Judge the right to enforce pre-hearing deadlines established in the notice of hearing to prevent surprise and trial by ambush.

Summary of the Evidence

Robert T. Sandman, III ("Claimant" herein), forty-five (45) years of age, with a tenth grade formal education and a GED obtained in 1981 (RX 11 at 7), as well as an employment history of manual labor, began working on August 29, 1977 as a shipfitter at the Groton, Connecticut shipyard of the Electric Boat Company, a division of the General Dynamics Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. Claimant's work as a shipfitter has often been described as that of a carpenter working with steel rather than wood. He worked all over the boats on the building ways, in the South Yard and on the docks, often working in tight and confined areas, and sometimes in awkward positions, Claimant remarking that he did much shielding and lead work and he compared his duties to working with large so-called "Lincoln Logs." He has sustained several back injuries at the shipyard and he has also experienced knee and bilateral hand problems. (TR 52-56; RX 16)

On July 15, 1991 Claimant was working in the reactor bulkhead of the 741 Boat and he injured his low back while "twisting" his body to move "heavy plates in (a) tight area." He reported the injury to his supervisor, Mr. LeBlanc, and continued working. However, during the next day, his back pain worsened and he

reported the injury at the Employer's Yard Hospital at the start of the second shift. A lower back sprain/strain was diagnosed and ice packs were applied to the affected area for twenty minutes and he was advised to use ice packs, moist heat and Ibuprophen as needed. He was also advised to see his own doctor if the symptoms persisted. The injury was recorded by the Employer as a work-related injury. Claimant continued working and lost no time because of that injury. (TR 56-58; CX 2)

On August 15, 1991 Claimant reinjured his back while working in the engine room of the 736 Boat and installing deck screws while working in bent positions for an extended period of time. He reported the injury to his supervisor, Mr. T. Forthrup, and he continued working the rest of the shift. However, the low back pain worsened and he could not move his back when he awoke the next morning. He telephoned the Employer's Yard Hospital and advised them that he had injured his back that evening, that he could not work the next shift and that he was going to see his own doctor. I note that somehow that telephone call was not entered into the Employer's computer system, according to the entry on the report for that August 15, 1991 injury. (CX 3) I also note that that report reflects that Claimant had "no HX (history) of back problems" and that he was told to submit a doctor's report and disability slip covering that lost time. The incident itself was reported as an occupational injury. (**Id.**)

On August 16, 1991, Claimant went to see Michael J. Falk, D.C, and the doctor, in his August 20, 1991 report (RX 1-6), diagnosing the low back symptoms due to an acute lumbar spine sprain/strain and a subluxation at C4-5, recommended appropriate chiropractic treatment and kept Claimant out of work as totally disabled because of his work-related injury, the date of which was identified as July 15, 1991. (**Id.**) The doctor prescribed twelve such treatments and a re-evaluation of Claimant at the time those treatments ended. (RX 6-2)

Claimant remained out of work until September 16, 1991, returned to work for two days and then went out on disability status on September 18, 1991. (RX 17) Claimant's September 23, 1991 lumbar spine CT scan showed a disc abnormality at L5-S1. (CX 5) Claimant was then referred for a neurological evaluation and Dr. Donald W. Cooper examined Claimant on September 25, 1991. The doctor read Claimant's lumbar spine x-rays as showing a ruptured disc at L5 with S1 radiculopathy on the right side and recommended surgical intervention to alleviate the symptoms. However, Claimant wanted to discuss his options with Dr. Falk and Dr. Cooper prescribed anti-inflammatories and scheduled a followup exam in one month's time. (CX 4A) As conservative treatment did not provide the anticipated relief, Claimant went to see Dr. Cooper on October 16, 1991 and the doctor, after reporting that Claimant's MRI done several days earlier showed "an extremely large apparent extruded disc at L5 on the right," again diagnosed a ruptured disc at L5

with S1 radiculopathy on the right. Dr. Cooper again recommended surgery "in view of the appearance of new neurologic finding (right gastrocnemius weakness) and the striking CT and MRI findings, and Claimant agreed to the surgery. (CX 4b)

Dr. G.T. McGillicuddy saw Claimant on October 22, 1991 for a pre-op clearance for a lumbar discectomy on October 24, 1991 (EX 7), to remove "a very large disc herniation at L5-S1 on the right." (CX 4c) The doctor saw Claimant on December 2, 1991, at which time Claimant had "no leg discomfort" but did "have back discomfort," symptoms which were exacerbated "after he carried a 23 pound turkey on Thanksgiving." The doctor kept Claimant out of work as he was "fully disabled" and prescribed a course of physical therapy. (CX 4d) The doctor saw Claimant on December 30, 1991, at which time he "still ha(d) some back discomfort and limitation of flexibility in his spine;" the doctor "suggested that he continue on physical therapy for the next several weeks" and then be re-evaluated to determine his ability to return to work. (CX 4e) On January 28, 1992 Dr. McGillicuddy kept Claimant out of work and prescribed physical therapy for another four weeks. (CX 4f)

Dr. David C. Cavicke, also a neurologist and an associate of Dr. McGillicuddy, examined Claimant on March 9, 1992 and the doctor reported that Claimant "has had complete relief of right leg pain" but "has continued to have some low back discomfort..." As Claimant wanted to return to work without, any restrictions, Dr. Cavicke released him "to return to his regular work... on March 16, 1992." (CX 4g) Claimant did return to work on that day and the Employer paid appropriate compensation benefits for that absence from September 18, 1991 through March 15, 1992. (RX 17)

Dr. Cooper saw Claimant on June 25 1992 for a flare-up of back pain resulting from being "reassigned to working in the reactor" room, work which "involves constant bending, working in cramped spaces, considerable climbing both on ladders and over objects, and often lifting heavy objects.'" The doctor's impression was a "recurrent lumbosacral strain on a musculoligamentous basis" and he saw "nothing to suggest new or recurrent disc herniation at (that) time..." Dr. Cooper recommended a lumbar CT scan, prescribed anti-inflammatories and imposed restrictions against "lifting in excess of 35 pounds, no ladder climbing, no frequent bending or twisting, and no working in cramped spaces." (CX 4h) Dr. Cooper next saw claimant on July 24, 1992 and Claimant's condition was essentially unchanged. The doctor, reporting that Claimant's MRI two weeks earlier (CX 6) "show(ed) postoperative scar at the L5 level on the right, but with no evidence of new or recurrent disc herniation," had an "extensive discussion (with Claimant) regarding his work capabilities" and continued the work restrictions because "with each attempt to increase his activity (at work), he experiences such significant increase in back discomfort that he is concerned if he tried to do this (regular work) he might become unable to work at all." Dr. Cooper continued the anti-inflammatories and

prescribed a course of "physical therapy three times weekly for the next month." (CX 4i)

At the August 25, 1992 examination, Claimant advised Dr. Cooper that he felt "greatly improved on his new regimen" of "doing office work" and the doctor continued the treatment plan for another three weeks. (CX 4j) However, the low back pain continued and, as of October 22, 1992, Dr. Cooper opined that "the only additional therapeutic suggestion would be a trial of lumbar epidural steroids." Claimant deferred this suggestion and the doctor continued the conservative treatment and work restrictions. (CX 4k) As of May 14, 1993, Claimant's condition was "unchanged" and the doctor continued Claimant's "light duty restrictions" and told him to continue with his office job at the shipyard. Claimant was told to return to see the doctor as needed. (CX 4l)

As of May 29, 1996, Dr. Henry Brown, also a neurologist with the Neurological Group, examined Claimant and at that time Claimant "continue(d) to work full time at Electric Boat as a shipfitter" and still was experiencing "occasional low back pain and occasional right posterior thigh pain with activity," as well as new symptoms described as "numbness and tingling in both hands, particularly at night," although "(o)ccasionally during the day he note(d) some numbness in his hands." Dr. Brown opined that Claimant's lumbar spine difficulty was "unchanged," continued his work restrictions and rated Claimant's lumbar spine disability at ten (10%) percent permanent partial disability. (CX 4m)

Dr. Joel N. Abramovitz, also a neurologist with the group, saw Claimant on June 1, 1999 and the doctor reported that Claimant "was able to get along on modified work until he was laid-off in 1996. Since then he moved to New Hampshire, tried a number of different jobs and subsequently has moved back" to Connecticut. The doctor's impression was "recurrent episodes of nonradicular low back pain" and he continued the Celebrex and Tranxene, also prescribed a course of physical therapy and scheduled a followup examination in one month. (CX 4n) (The record does not contain a report of that examination, or even if it took place.)

The Employer's Hospital Visit Reports relating to those occasions when Claimant went to the Yard Hospital for his "nervous breakdown," in evidence as CX 9 and dated between December 4, 1995 and September 18, 1996, reflect that he was out of work for that "personal illness" from November 8, 1995, that he was released to return to work on December 4, 1995 on light duty (CX 12), that the Employer provided suitable adjusted work for one day, that Claimant again went out of work for non-industrial reasons, that he returned to work on January 18, 1996 (CX 11) with no restrictions as the medications he was taking for his "severe anxiety/depression" had "no side effects," that he was again out of work from August 14, 1996 to August 20, 1996 because of non-industrial knee problems and that Claimant was advised to see his own doctor on September 18,

1996. (CX 9; CX 10) Claimant's personnel records reflect that he was laid-off on October 4, 1996 in a **bona fide** reduction due to cutbacks in the defense industry. (RX 16-4)

After his layoff, Claimant moved to New Hampshire to get a fresh start and he first went to work for a company manufacturing auto cylinders from April 7, 1997 through June 27, 1997, earning a total of $5,662.60, based upon his rate of $11.00 per hour. While this work at a machine was easier than shipfitting, Claimant's production was slower than his co-workers because of his back problems and he was terminated just prior to the end of his ninety (90) days probationary period. He collected unemployment for about five (5) months and he then went to work on August 4, 1997 at an aero-space technology firm manufacturing tubing for jets and rockets. He was hired as a fitter/fabricator at a starting salary of $9.50 and he was then assigned to work as a brazier. While he could do that work, he again was terminated on October 27, 1997 because of the lost time due to his back problems and the medication he was taking for his depression as the medication made him drowsy. He earned a total of $6,137.83 at this company. He was not eligible for unemployment benefits and he then went to work on November 25, 1997 as a maintenance worker at an automobile dealership in Tilton, New Hampshire. However, the job involved much physical janitorial work. This heavy work, especially the snow shoveling, aggravated his back problems. He was able to do that work until December 29, 1997 and he earned a total of $1,197.60 at this job. He left that job because he physically could not do that job. Claimant has experienced psychological problems for many years and he has been treated by Dr. Ruffner and then by Dr. Awwa thereafter. The Employer provided suitable alternate light duty work for many years, first in an office and then in the South Yard as the Employer kept Claimant off the boats. (CX 9; CX 10; TR 65-79)

After his layoff, Claimant's compensation benefits were reinstated on March 25, 1998 because he agreed to cooperate with the Employer's efforts to retrain him for other work through the auspices of the Connecticut Workers' Compensation Commission (RX 17) but these benefits were terminated on April 20, 1999, allegedly because Claimant would not cooperate with the vocational rehabilitation efforts, and this issue will be more fully discussed below. (TR 64, 80-81)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a for-the-most-part credible but poorly motivated Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from

it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created

under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-

presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his herniated disc at L5-S1 and his chronic lumbar disc syndrome, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the

sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I find and conclude, that Claimant’s herniated disc at the L5-S1 level and the resultant chronic lumbar disc syndrome directly resulted from his shipyard accident on August 15, 1991, that the Employer had timely notice thereof, authorized appropriate medical care and treatment and paid certain compensation benefits while he was unable to work because of his lumbar problems (RX 17) and that Claimant timely filed for benefits (CX 1) once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant’s disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former

employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work as a shipfitter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, as already discussed above, the Employer did not timely submit any evidence as to the availability of suitable alternate employment, but Claimant found work through his own efforts. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total and partial disability, as further discussed below.

Claimant's injury has not become permanent as he requires additional medical treatment. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT)

(2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no

longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total and/or partial disability for various periods to date and continuing. Moreover, the issue of permanency has not yet been considered by the Deputy Commissioner. (ALJ EX 2) **In this regard**, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

This closed record establishes that Claimant’s post-injury wage history establishes that he is only partially disabled but his post-injury wages are not representative of his wage-earning capacity as his efforts have been sporadic, that he has learned how to live with and cope with his weakened back condition and that his various employers have allowed him to compensate for his back limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant has a residual work capacity to return to work. All the doctors agree that he can return to work and only Claimant believes he is totally disabled. While there is no obligation on the part of the Employer to rehire Claimant and provide suitable alternate employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer

is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As indicated above, the Employer did not timely offer a Labor Market Survey in an attempt to show the availability of work for Claimant within his restrictions. It is well-settled that the Employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Employer must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

Once claimant establishes that he is unable to do his usual work, he has established a **prima facie** case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031, 1032, 14 BRBS 156, 165 (CRT) (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area in which he was injured or in which claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. **Turner**, **supra**; **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 667, 671, 18 BRBS 79, 83 (CRT) (5th Cir. 1986); **Mijangos v. Avondale Shipyard, Inc.**, 19 BRBS 165 (1986). A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, **Peele v. Newport News Shipbuilding & Dry Dock**, 18 BRBS 224, 226 (1987), and if the job is available to claimant. **Wilson v. Dravo Corp.**, 22 BRBS 463, 465 (1989); **Beaulah v. Avis Rent-A-Car**, 19 BRBS 131, 133 (1986). Moreover, employer is not actually required to place claimant in alternate employment, and the fact that employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that employer has met its burden. **Turney v. Bethlehem Steel Corp.**, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not **bona fide**. **Diamond M Drilling Co. v. Marshall**, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); **Jameson v. Marine Terminals**, 10 BRBS 194, 203 (1979).

While the **Abbott** case is support for an employee's ongoing entitlement to temporary total disability benefits herein despite the evidence which shows that he is only partially disabled, that case is not applicable herein.

The Board has held that a claimant may continue to receive total disability benefits even in those cases where an employer has established the availability of suitable alternate employment at a minimum wage level, but where claimant is precluded from working because he is undergoing vocational rehabilitation. **Abbott v. Louisiana Insurance Guaranty Association**, 27 BRBS 192, 201-203 (1993). In **Abbott**, the Board affirmed the remedy fashioned by Judge Ben H. Walley as "it comports with the fundamental policies underlying the statute and its humanitarian purposes. **Abbott**, **supra** at 203.

As noted above, Claimant's benefits were reinstated on March 25, 1998 (RX 17) because Claimant agreed to cooperate with the Employer's efforts to retrain him for other work through the auspices of the Connecticut Workers' Compensation Commission and its rehabilitation counsellors, initially Cherie L. King, M.Ed., CRC, CDMS, and then William Witt, M.Ed., CRC. However, benefits were terminated on April 20, 1999 (RX 17) after the Employer charged that Claimant was not cooperating with these counsellors and that he had voluntarily removed himself from the labor market. Thus, this case essentially comes down to this issue: who said what, who did what, when and how????

According to Claimant, Ms. King came to his house and suggested that he take an aptitude test to determine his transferrable skills. He then filled out the appropriate paperwork and answered all of the questions about his social and employment history and his job interests. He indicated to Ms. King that he was interested in work as an ultrasound technician, Claimant remarking that he met with her on three occasions and that eventually, because of a personality conflict, she referred his case file to Mr. Witt for followup. Claimant testified that he went to a facility at the suggestion of Ms. King and spoke to the person in charge there, and he learned that the facility was looking for a person who would work with and train individuals who are mentally challenged. That job lead did not bear fruit. He also obtained a list of local community colleges providing training to become an ultrasound technician. He also went to local high schools and inquired about taking computer courses, as well as industrial arts courses. None of these efforts produced any results, Claimant admitting that the medication he takes for his severe depression affects his memory, stamina and energy level and that it seems as if he is "in a haze" and just "drift(s) through the day." Claimant also admitted that Ms. King and he discussed his motivation to return to work and the level of his cooperation, Claimant remarking that she and he had a "personality problem" and that he has not

seen her since her May 14, 1999 referral to Mr. Witt. (CX 14; TR 80-85)

Ms. King's initial vocational assessment is dated April 13, 1998 (RX 10-1) and, in that report, Ms. King, after considering Claimant's medical factors, work history, education and training, other vocational factors and financial/social factors, opined that Claimant "would be an excellent candidate for vocational rehabilitation due to his interest and motivation to return to work," that "(o)nce we are able to identify an appropriate vocational goal ... (she would) be referring Mr. Sandman to DWR to pursue funding for a training program," and that she would "assist him in developing a plan, investigating programs, evaluat(ing) labor market and wages as well as approval of physical demands of the goal." (RX 10-4)

In her June 15, 1998 followup report (RX 10-5), Ms. King stated that Claimant had failed to keep their May 13, 1998 meeting without notice to her, that he had failed to followup on a number of vocational leads she had given him, that he "had done minimal research regarding the occupations we had discussed previously," other than purchasing a copy of the book entitled "**What Color is Your Parachute**," that he had agreed to talk to individuals actually working as a "residential counsellor" or as an "alcohol and substance abuse counselor" and that the identities of two such individuals were made known to Claimant on June 15, 1998. Ms. King reminded Claimant "that we will need to be more focused and time conscious regarding this process." (RX 10-6)

In her August 10, 1998 followup report, Ms. King stated that Claimant did not meet with the first counsellor until July 25, 1998, that she did not learn that the "informational interview" had taken place until she called him, at which time she also learned that he had failed to followup on previous information and leads she had given him. Ms. King again reminded Claimant that "he needs to take this process seriously and begin to concentrate on the vocational process." She sent him additional information "as well as a letter indicating that (she) expected by (their) next appointment on August 11th that he consider concentrating on this vocational rehabilitation process and making it a priority." However, Ms. King "received a message from the injured worker on late Friday, August 7 or Saturday, August 8, saying he was unable to keep (their) appointment **as he has reservations for a camping trip** and would contact (her) upon his return," Ms. King concluding: **It is questionable whether the injured worker is (sic) has interest in the process of determining a new career because he has demonstrated a less than enthusiastic attitude and motivation for doing his own homework and research. It appears he has had other priorities."** (Emphasis added) (RX 10-8)

In her September 18, 1998 report, Ms. King stated that she and Claimant met as scheduled on September 2, 1998, that Claimant was

angry because her most recent report "made him look like a 'bum'," that their personality clash surfaced at that meeting, that Claimant advised her that "he did not realize that he was expected to follow through and take a more active role with his own vocational exploration and research," that "there had been other things going on in his life and that his focus had been elsewhere" and "that it was his lack of understanding about what he was supposed to do and that is why (she) assumed he was not interested or motivated." (RX 10-9)

At that September 2, 1998 meeting, Claimant finally indicated "that he would like to pursue training as an Ultrasound Technician." However, Ms. King "reviewed the job description and aptitudes for the Ultrasound Tech and (she) indicated that (she) was not sure that this would be an appropriate goal due to his tested academic levels." Claimant stated that he would do whatever was necessary to be trained in that field and Ms. King informed Claimant that she "would refer him to the Department of Worker's Rehabilitation and (she) let him know that funding of the program is not automatic and he would need to go through further vocational testing through the Department of Worker's Rehabilitation." She also advised Claimant "that he would need to do research and documentation and provide the DWR with a proposal letter with supporting evidence as to why he would be capable of competing in a training program and that there would be jobs available for him." According to Ms. King, Claimant "did not sit down once during (their September 2, 1998) appointment because he was too upset with" her and she reminded him that he had to take a serious approach to the process and that she "expected as well as National Employers expected him to take much more of an active responsible role in the vocational rehabilitation process." She then "contacted Bill Witt of the (DWR) and made a referral" of Claimant to him. (RX 10-10)

In her January 26, 1999 progress report (RX 10-12), Ms. King stated that Claimant did meet with Mr. Witt on October 22, 1998, that "Bill indicated that he felt that there were attitude issues on the part of the (Claimant) regarding his motivation to return to work," that "he (Mr. Witt) felt there may be some depression, but he felt that the (Claimant) was not focused on a return to work." Ms. King telephoned Claimant on October 30, 1988 and, according to Ms. King, he "was very vague with (her) on the phone," that she "received mostly 'yes' and 'no' answers" to her questions, that Mr. Witt advised her in November "that he referred (Claimant) to take the general aptitude test battery and will be meeting with him after the program," that Claimant was unable to take the GATB as scheduled "because he forgot his glasses and had rescheduled to take the examination in January of 1999," that later Mr. Witt advised her that Claimant "did not perform very well on the test and had low to low average scores on the majority of categories," that he would "be scheduling an appointment to meet with (Claimant) to discuss these results," that he "is not certain of what he can

offer" the Claimant and that he "also will further evaluate the (Claimant's) motivation and what he has done to research and investigate programs." (RX 10-13) That is the last report from Ms. King in this closed record.

Ms. King reiterated her opinions at her July 6, 1999 deposition and, in my judgment, she testified forthrightly and candidly and her opinions withstood intense cross-examination by claimant's counsel. (RX 11)

Ms. King has been a certified rehabilitation counsellor since 1989, has a master's degree in rehabilitation counseling from Springfield College in May of 1988 and obtained her "certified disability management specialist certification in April of 1996. She has been a fellow with the American Board of Vocational Experts since January of 1989 and she has been certified as an "expert administrator" with the Social Security Administration in Hartford since 1985. (CX 11 at 3-4) Ms. King, who was retained by the Employer to prepare a vocational assessment of the Claimant and to determine his rehabilitation potential, testified that her opinions relating to the Claimant's transferrable skills and his residual work capacity were based on her interview of the Claimant, his test results, his employment history and his medical records. (**Id.** At 5-6) According to Ms. King, she had expected Claimant to be more active in this rehabilitation process and the tasks she gave him to perform should have taken no more than sixty (60) days, and she was not pleased with Claimant's lack of cooperation and progress. (**Id.** At 19) Moreover, Claimant "never said anything to (her) about him not understanding what was going on or what he was supposed to be doing." (**Id.** at 21) Furthermore, "Voc. rehab is a two way street. (She is) there to help and assist the injured worker as much (as she can) with resources as possible. (But she) cannot do the work for them." (**Id.** at 22)

With reference to work as an ultrasound technician, Ms. King did not believe such work was appropriate "because of the repetitive arm and hand movements that are required" in view of his bilateral carpal tunnel syndrome, a condition rated by Dr. S. Pearce Browning, III, at twelve (12%) percent of each hand as of March 2, 1997. (CX 8; RX 11-24) Ms. King referred Claimant to Mr. Witt for appropriate followup at the DWR. (**Id.** at 26) According to Ms. King, Claimant told her that his severe depression did not affect his lack of progress. (**Id.** at 29) As Claimant's test scores would not support training as an ultrasound technician, DWR "would probably try to guide him towards a more appropriate occupation that was within his aptitudes." (**Id.** at 32)

As of May 3, 1999, Claimant had still not investigated the programs suggested by Mr. Witt in inquiring as to the location of appropriate training courses, the costs thereof, sources of funding, etc., a task which should have taken Claimant about a week or so. (**Id.** at 34-36) Furthermore, during those conversations,

"he would talk about certain occupations in general, but he really didn't seem like he really did his homework to be able to talk about them specifically (as to) what he actually had done." (**Id.** at 41) Ms. King first met with Claimant in March of 1998 and she anticipated, based upon her experience with other injured workers, that he would be fully enrolled and participating in a training program by September of that year. However, such was not the case here, given Claimant's motivation and lack of progress. (**Id.** at 42-47) Ms. Witt also questioned Claimant's motivation and his lack of progress. (**Id.** at 47)

Ms. King opined that Claimant is employable and "has a work capacity in some unskilled type of jobs" but not as an ultrasound technician because of his "educational background and the way he tested as well as physical demands of the occupation" but that it "would have been appropriate working with individuals with disability" and "maybe if he worked real hard and tried to get up his academic levels, that maybe either computer drafting (or graphic arts) might be appropriate for him." (**Id.** at 49) According to Ms. King, there are ample jobs available within this part of Connecticut in the field of human and social services at entry level salaries of $7.00 to $9.00 per hour. (**Id.** at 49-50) No specific jobs were identified as "we weren't at a placement point." (**Id.** at 50)

Mr. Witt sent the following letter to Claimant on May 14, 1999 (CX 14):

"Dear Robert,

I am writing this letter, at your request, to clarify our working relationship.

The following is a chronology of our meetings and developments for your case:
Initial meeting 10/22/98
Eligibility determined-11/9/98
Letter requesting you to take GAT-B-11/9/98
GAT-B Aptitude Testing received-1/14/99
Appointment to review GAT-B-2/4/99
Appointment, at your request, to resume working-5/13/99

You indicated, at our meeting of 5/13/99, that the prior private rehabilitation counselor used a counseling style that was more controlling and directive in terms of what you could do and couldn't do for occupational goals. She also did research and exploration for you based upon the results of your meetings. You thought her referral to me for possible training was a continuation of that style of service.

I have explained at our meeting on 5/13/99 that my style of counseling depends upon you to solve your own employment related

problems as you progress towards the ultimate goal of having a job again. I will coach, suggest strategies, and will be an expert resource for you to use, but I will not actually do the work for you. I will be focused and careful to make sure that there is a good employment potential for your career choices and that the demands of your choices are within your physical and aptitude limits.

I really can understand your confusion and misunderstanding due to the differences in our styles. I can also see why you did not follow up on assignments that I was expecting you to complete.

I hope this letter helps you and I look forward to working with you and seeing you accomplish your goal of returning to work."

The parties deposed William Witt on September 14, 1999 (RX 20) and Mr. Witt, who received his bachelor of arts in psychology from Southern Connecticut State University in 1969 and his master's in education from Springfield College in 1977, has worked as a vocational counselor since 1974 and "started with the (Connecticut) Worker's Compensation Commission in February of 1990." He is "a certified rehabilitation counselor" and is "pending licensing as a professional counselor through the State of Connecticut." Mr. Witt, who interviewed Claimant on October 22, 1998 and obtained the usual social, employment and medical history, opined that Claimant is able to work at light duty work, even with his documented medical problems and his learning disabilities, that Claimant did not cooperate with his vocational rehabilitation efforts, that he really did not followup on suggestions that he made to the Claimant, that Claimant did not have the intellectual capacity to work as an ultrasound technician, and he so advised Claimant and that he discussed with Claimant, other fields of endeavor, such as graphic arts, photography, industrial photography, computer repair, radio announcing and human services. (RX 20 at 3-16)

At no time did Claimant advise Mr. Witt that he was having difficulty following directions for any reason other than that he had a personality conflict with Ms. King. Moreover, Mr. Witt "did not see any urgency in terms of his looking for options," Mr. Witt seeing "a high degree of negativity at times ... towards finding employment in general. And ... that affected his attitude when approaching employers and other people." (RX 20 at 17-21)

Mr. Witt would recommend for Claimant a realistic training program in any area in which he shows a specific interest and for which he does the appropriate research, and he would attempt to obtain funding for such program. (RX 20 at 23) He has not seen Claimant since their last meeting on July 15, 1999 and has not seen "a strong imperative to (return to?) work for whatever the reason." (RX 20 at 25-26)

Claimant's skills would permit him to earn "a dollar or two above minimum wage." (RX 20 at 28) According to Mr. Witt, the longer that Claimant remains out of work, "the less likely it would be possible (for him) to get back to employment regardless of retraining." (RX 20 at 30) Moreover, "the greater majority" of injured workers "become reluctant to work after (being awarded) Social Security disability" benefits. (RX 20 at 31)

Mr. Witt's opinions withstood intense cross-examination by Claimant's counsel. (RX 20 at 32-42)

Christopher Tolsdorf, Ph.D., ABPP, performed a psycho-educational evaluation of the Claimant at the Employer's request and Dr. Tolsdorf concluded as follows in his March 30, 1998 letter to the Employer (RX 12-4):

DISCUSSION

Mr. Sandman is a man with a long history of having worked with his hands in metal work and construction. Although he is apparently restricted from heavy lifting, he appears to have adequate use of his hands for most purposes including operating equipment, machinery, or lighter weight tools. His intellectual abilities are intact but weaknesses in math and spelling would make college-level academic work unwise. He has the combination of skills necessary to complete a technical training course, unless it is one with heavy demands on writing, documentation, or higher math skills. His interest in medical technician jobs may be a possibility, but the particular program would have to be closely evaluated to insure that it was within his capacity level. His interest in art may bear further examination, and he may do well in drafting, design, graphic design (which would blend his interests in computers and art), or sign painting. None of these jobs would be physically demanding, and would combine his ability in working with his hands with his artistic talents. Alternatively, light weight assembly or bench work may be a possibility, as would less demanding trades such as machinist, tool operator, or quality control inspector.

In view of the foregoing, I find and conclude that Claimant has a residual work capacity far in excess of that to which he testified. In so concluding, I initially accept the forthright, probative and persuasive testimony of Ms. King, a well-respected vocational rehabilitation consultant and an expert for the Social Security Administration, that Claimant, for whatever reasons, simply did not cooperate with the employer's efforts to retrain him for other fields of endeavor within his transferrable skills, intellectual capacity and physical restrictions because of his multiple medical problems. Claimant's lack of cooperation from March of 1998 through the present has resulted in a failed effort and which should have borne fruit well before this time. To show good faith, the Employer reinstated Claimant's benefits on March 25, 1998 on his assurance that he would cooperate with the

retraining efforts. However, he failed to cooperate, collected his $339.41 per week, purchased a camper, cancelled at the last minute a scheduled meeting with Ms. King to go on a camping trip for seven to ten days, failed to followup in a timely manner suggestions by Ms. King or Mr. Witt and followed up on other suggestions in a half-hearted or reluctant manner and stalled the process to such an extent that the Employer finally terminated benefits on April 20, 1999. (RX 17)

Accordingly, in view of the foregoing, I find and conclude that Claimant, if properly motivated to return to work, can work full-time eight (8) hours per day, forty (40) hours per week, in light duty and sedentary work within his restrictions, that he has a post-injury wage-earning capacity of $170.00 (**i.e.,** 40 hours x $4.25, the minimum wage in effect as of August 15, 1991),[1] and that pursuant to Sections 8(e) and 8(h), he has established a loss of wage-earning capacity of $339.12 (**i.e.,** $509.12 - $170.00 =), and he is entitled to an award of benefits for such loss commencing on April 21, 1999. He is also entitled to the other benefits he seeks commencing on October 5, 1996. (CX 15)

I agree completely with Ms. King and Mr. Witt that Claimant has been too passive in this process, has not made a **bona fide** effort to retrain himself to return to gainful employment, that he has not been focused in his efforts and that he has been content to let others do the tasks for him. As stated by Ms. King, vocational rehabilitation is a two-way street but such has not been the case with the Claimant. This closed record conclusively establishes that since March 24, 1998 (RX 10-1), the street has been mostly one-way and with several detours along the road.

Claimant now must show that he is ready, willing and able to return to work, just like any other unemployed worker, and he must cooperate with these rehabilitation efforts (and, hopefully, these will continue) and he must diligently and conscientiously follow all of the leads given him by Ms. King, Mr. Witt, his attorney or any other vocational consultant who enters the picture. As noted above, only Claimant believes he is totally disabled and all of the record evidence in documentary form leads to the conclusion that he can return to work if properly motivated.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per

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[1]I have used the minimum wage in effect as of August 15, 1991 as Claimant's current wage-earning capacity must be adjusted for the post-injury inflation since August 15, 1991.

annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer, although initially controverting Claimant's entitlement to benefits (RX 2), nevertheless has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to Claimant as stipulated by the parties. (TR 6-7; RX 17) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-**

Walsh Stevedoring Company, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related back injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after April 7, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of this decision and Employer’s counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for his temporary total disability from October 5, 1996 through April 6, 1997, from June 28, 1997 through August 3, 1997, from October 28, 1997 through November 24, 1997 and from December 30, 1997 through September 2, 1999, the date of the hearing before me, based upon an average weekly wage of $509.12, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Employer as a self-insurer shall pay to Claimant compensation for his temporary partial disability, based upon the difference between his average weekly wage at the time of the injury, $509.12, and his wage-earning capacity after the injury, $170.00, as provided by Sections 8(e)and 8(h) of the Act, and such benefits shall commence on September 3, 1999 and such shall continue for as long as he is eligible therefor.

3. The Employer shall also pay to Claimant temporary partial disability from April 7, 1997 through June 27, 1997 at the weekly rate of $9.31, for a total of $99.75, pursuant to Section 8(e) of the Act.

4. The Employer shall also pay to Claimant temporary partial disability from August 4, 1997 through October 27, 1997 at the weekly rate of $24.64, for a total of $299.20, pursuant to Section 8(e) of the Act.

5. The Employer shall also pay to Claimant temporary partial disability from November 25, 1997 through December 29, 1997 at the weekly rate of $201.95, for a total of $1,009.75, pursuant to Section 8(e) of the Act.

6. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 15, 1991 injury.

7. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

8. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

9. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on April 7, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:dr